



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

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**DECISION OF THE BOARD**

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Mailed and Filed: JANUARY 09, 2023

IN THE MATTER OF:

Appeal Board No. 610026

PRESENT: GERALDINE A. REILLY, MEMBER

The Department of Labor issued initial determination (including December 6, 2018) assessing . (hereinafter the "employer" or "LG") tax contributions due in the amount of \$2,149.00 for the audit period 1st quarter 2016 through 2nd quarter 2018, plus a 50% fraud penalty, based on estimated payments to the corporate president and to a laundromat worker, SG (hereinafter the "claimant"). Contending it has no employees, LG requested a hearing ( and Appeal Board No. 610026).

The Department of Labor deemed the claimant to be an employee with credited remuneration from the employer regarding the claim for benefits effective May 28, 2018 (019-23491 and Appeal Board No. 610027).

The Administrative Law Judge (ALJ) held combined telephone conference hearings at which all parties were accorded an opportunity to be heard and at which testimony was taken. There were appearances on behalf of the employer and the Commissioner of Labor. By combined decision filed December 31, 2019, the ALJ granted the employer's application to reopen the combined prior case and overruled the initial determination.

The Commissioner of Labor appealed the ALJ's decision to the Appeal Board, insofar as the initial determination was overruled. The Board considered the arguments contained in the written statement submitted on behalf of the Commissioner.

By Remand Order filed February 22, 2021, the Board remanded the case to the Hearing Section for a further hearing to be considered by the Board. An ALJ

held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant, and on behalf of the employer and the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The corporate president, the sole owner of LG, operates a laundromat in Brooklyn, New York. The president washed and folded the clothes for customers requesting drop-off/pick-up service. The laundromat is open for business seven days per week from 8 AM to 10 PM.

The claimant is a customer of the laundromat where she brings her clothes to wash. The claimant suffers from a minor disability and the president occasionally assisted the claimant. In or about October 2017, the claimant asked if she could "help" because she needed money. The claimant offered to assist folding clothes at the rate of \$0.65 a pound. The president advised that the business is not very profitable and countered at the rate of \$0.10 cents a pound, which claimant accepted.

The president weighed and tagged the clothes for the claimant to fold. The president showed the claimant how the clothes should be folded. The president checked claimant's work and re-folded the clothes when necessary. The president paid the claimant in cash, daily on occasion but "most likely" on a weekly basis.

The claimant worked folding clothes during the occasions she came to the laundromat. The claimant's diary (Commissioner of Labor's Exhibit 3) annotates the customer's name and pounds of clothes for sporadic dates in 2017, e.g., October 12, 16, 20, 23, 28, 31, and November 3, 6, 10, 14, 18, and 22. The diary also acknowledges certain payments received. The diary further contains annotations of "cleaning".

Subsequent to the claimant's claim for unemployment insurance benefits made effective May 28, 2018, the Department of Labor commenced a claim investigation of LG. The Department's auditor contacted LG but did not receive a response. The Department issued a subpoena to LG without response. The auditor conducted a site visit and observed two businesses operated out of the same location - a real estate office (Leonite Gourdet Real Estate Corp.) and LG, both entities having the same corporate officer and deemed to be

financially related. In addition to the president, the auditor observed another woman folding clothes. As the books and records were not available at the laundromat, the president advised that her accountant would provide the Department with the requested books and records.

The auditor determined that LG's workers' compensation insurance policy ended February 2017 and other insurance policies ended in January 2018. At an informal conference, LG's accountant made available the business bank statements and the 2017 tax return. LG was given additional time to produce other books and records, e.g., canceled checks, ledgers, and additional tax returns. LG did not produce the additional records. For the relevant audit period, the Department assessed two individuals (corporate officer and claimant) as the corporation's employees estimated on the maximum annual taxable wages, and further assessed a fraud penalty.

OPINION: The credible evidence establishes that the corporate entity employed at least two individuals, the president and the claimant. The president conceded she performed services for the business, which services are properly deemed to be covered employment. See e.g., *Matter of JD Station Plaza Realty Inc.*, 127 AD3d 1451 [3d Dept 2015]; and *Matter of Regan & Regan PC*, 256 AD2d 829 (3d Dept 1998).

Also, we find and conclude that the president exercised sufficient supervision, direction, or control over the claimant's services to establish an employment relationship. The president set the claimant's payrate, tagged and weighed the clothes for folding before giving them the claimant, trained the claimant how to fold clothes, helped the claimant, and corrected her work. The claimant performed the work on a folding table at the laundromat.

Regarding the fraud penalty, the evidence further establishes that the Commissioner's determination was reasonably permissible. Pursuant to Labor Law § 570(4), an employer is subject to a fifty-percent penalty of the total

amount of the deficient contributions due if any part of such "deficiency" is due to fraud with intent to avoid payments of contributions. Not only were payroll records concededly not maintained, but LG ignored the Department's subpoena to produce records, and further failed to comply after the Department provided additional time to do so. Notably, although the president performed services for LG, it failed to report the corporate officer's earnings. Accordingly, the Board finds and concludes that LG engaged in concerted

efforts to avoid payment of tax contributions to the Department of Labor. See Matter of Body Electric Corp. of America, 89 AD3d 1331 (3d Dept 2011); and Matter of Mamash Rest. Corp., 270 AD2d 723 (3d Dept 2000).

DECISION: The decision of the Administrative Law Judge, insofar as appealed, is reversed.

The initial determination, assessing . tax contributions due in the amount of \$2,149.00 for the audit period 1st quarter 2016 through 2nd quarter 2018, plus a 50% fraud penalty, based on estimated payments to the corporate president and to a laundromat worker (claimant), is sustained ( and Appeal Board No. 610026).

The claimant is deemed an employee of and is credited with remuneration from the employer regarding the claim for benefits effective May 28, 2018 (A.L.J. Case No. 019-23491 and Appeal Board No. 610027).

GERALDINE A. REILLY, MEMBER